



Local Government Council

**Wednesday, October 19, 2005
2:00 p.m.
404 House Office Building**



The Florida House of Representatives

Local Government Council

Allan G. Bense
Speaker

Ken Sorensen
Chair

AGENDA

LOCAL GOVERNMENT COUNCIL

October 19, 2005 - - 404 House Office Building - - 2:00 p.m. - 4:00 p.m.

I. CALL TO ORDER AND OPENING REMARKS

II. PRESENTATIONS

Florida Association of Counties

Florida League of Cities

III. MEMBER DISCUSSION OF THE ROLE AND RESPONSIBILITIES OF THE LOCAL GOVERNMENT COUNCIL

IV. ADJOURNMENT

OVERVIEW OF MUNICIPAL AND COUNTY POWERS

A. State and Federal Constitutions Generally

1. Nature of a Constitution - A constitution emanates from the people, not from the government.¹ It is a framework of fundamental principles by which the government is formed and under which the government operates.² According to the Florida Supreme Court, the constitution "is not designed to provide detailed instructions for the method of its implementation. This must of necessity be left up to the legislature."³ The constitution is the supreme law of the land, distinguished from other law by its permanency, brevity, and generality.⁴ If statutes, treaties, or administrative rules directly conflict with the constitution, the constitution must prevail.⁵

a. Nature of the Constitution of the United States - The federal constitution is a grant of power from the states and the people to the federal government. The federal government may not exercise any powers unless they are specifically bestowed or implied by provisions of the federal constitution.⁶ Indeed, the Tenth Amendment reiterates that all powers not conferred upon the federal government in the constitution remain with the states or the people. The federal government is a government of limited powers; powers delegated to the federal government by the states.⁷ Some powers are exclusively federal due to an express constitutional limitation. Others are inherently federal because of their nature. State governments, by contrast, are governments of unlimited power. Although these principles still hold true, in modern times the courts have interpreted the federal constitution so as to bestow sweeping powers upon the federal government.

b. Nature of the Constitution of the State of Florida - The Florida Constitution is a limitation on inherent power, rather than a grant of power.⁸ Although it is the supreme legal authority of the state, it must yield to valid federal law in areas where the two conflict.⁹ To determine whether a federal power or action is legitimate, its source of authority must be discovered within the text of the constitution. If no source is found, the power does not exist. State constitutions are different. As long as state governments do not contravene federal law, they are all-powerful. Consequently, state constitutions must be interpreted as restrictions on this inherent power. When determining the constitutionality of a state action, there is no need to search for empowering text within the state constitution. Rather, the state constitution must be reviewed to determine whether anything prohibits such an action.

2. Concurrent Federal and State Power - Where the federal government and a state government legislates on the same subject, the federal law is supreme and will, in general, have the effect of voiding the conflicting state law.

a. Sufficient Conflict - The Supremacy Clause applies when state law is inconsistent with federal law. If state law attempts to invalidate the substance of a federal law or treaty, the state law cannot stand. Similarly, state law which encourages conduct inconsistent with that required by federal law is invalid. The same result holds if state law forbids conduct that federal law is designed to foster, or interferes with the achievement of a federal objective.¹⁰ As a consequence, any and all state and local laws that conflict with the dictates of federal law must yield to this doctrine and are preempted.¹¹

b. Preemption - States are generally free to legislate in areas not controlled by federal regulation. Federal regulation of a particular subject, however, preempts state regulation related to the same subject. In *Barnett Bank of Marion County v. Nelson*,¹² for

instance, the United States Supreme Court held that a federal statute which granted small-town banks the authority to sell insurance preempted a Florida statute which prohibited such sales. Even where a state law does not directly conflict with a federal regulation, courts may still invalidate the law if they find that Congress intended to occupy the entire field.¹³ This is true even where the state law seems to reinforce or compliment the federal regulation. Courts tend to look at whether the scheme of federal regulation is comprehensive.¹⁴ They may also consider whether a federal agency has been created to administer the law in a particular field. If a federal agency has been established, courts will likely deem preempted all matters within the jurisdiction of the agency. However, state and local regulations established under the traditional police powers of states are not superseded by federal law unless preemption is the clear and manifest purpose of the federal statute; doubts must be resolved in favor of non-preemption.¹⁵

B. Home Rule Power of Municipalities

1. Municipalities Generally - The legislature has the exclusive power to establish and abolish municipalities and to amend their charters pursuant to general or special law.¹⁶ The power of the legislature to establish municipalities and prescribe their powers is subject only to restrictions specified in the constitution.¹⁷

Although municipalities are created primarily for the performance of municipal or governmental functions for the happiness, convenience, health, and general welfare of the inhabitants of a local community¹⁸, municipalities are an instrumentality or auxiliary agency of the state, established for the more convenient administration of local government.¹⁹ The establishment of a municipal corporation by following the statutory procedure is the exercise of a power emanating from the sovereignty of the state itself. When this power is exercised, it results in organizing a unit of government endowed with such aspects of sovereignty as the police power, the right of eminent domain, and the power to tax.²⁰

2. Constitutional Municipal Home Rule Power - The municipal home rule provision in Florida's Constitution authorizes cities to exercise any power for "municipal purposes" except as otherwise provided by law, and provides as follows:

Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

Art. VIII, § 2(b), Fla. Const.

This provision expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services. The only limitation on that power is that it must be exercised for a valid "municipal purpose." It would follow that municipalities are not dependent upon the Legislature for further authorization. Legislative statutes are relevant only to determine limitations of authority.²¹ The general rule is that if the state has the authority to exercise a particular power, then a municipality, under its home rule authority, may also exercise that power unless "expressly prohibited" by the Legislature.

3. Statutory Home Rule Power of Municipalities - The Florida Municipal Home Rule Powers Act²² authorizes municipalities to exercise their governmental, corporate, and proprietary powers to perform municipal functions and render municipal services and to exercise any power for municipal purposes, except when expressly prohibited by law. Section 166.021(4), F.S., of the Municipal Home Rule Powers Act provides in part as follows:

It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

4. Municipal Purpose Requirement – In order to determine the scope of municipal home rule power, it is necessary to first determine what qualifies as a "municipal purpose". Section 166.021(2), F.S., defines "municipal purpose" as "any activity or power which may be exercised by the state or its political subdivisions". The courts have concluded that "municipal purpose" comprehends all activities essential to the health, morals, protection and welfare of the municipality. "Though there was a time when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality."²³

While the term "municipal purpose" is not a restrictive term, it does require an activity to be related to the conduct of municipal government, the exercise of a municipal function, or provision of a municipal service.²⁴ "Municipal functions" are functions created for or granted for the benefit and advantage of the community included within the corporate boundaries and that specifically and peculiarly promote the comfort, convenience, safety, and happiness of the citizens of the municipality, rather than the welfare of the general public.²⁵

The courts have concluded that following constitute a "municipal purpose":

- a) The provision of day care educational facilities;
- b) Issuing bonds to finance a convention center which would provide a forum for educational, civic and commercial activities and would increase tourism and trade;
- c) Using public property for a sports stadium;
- d) The sale of souvenir photographs; and
- e) The expenditure of funds to promote the passage of a referendum.²⁶

However, the courts have also found that the following activities serve no "municipal purpose": borrowing money simply to reinvest the money and thereby derive a profit on the investment; a municipal ordinance opting out of an otherwise valid county road impact fee ordinance in a charter county; and the expenditure of public funds to promote the passage of a referendum.²⁷

C. Home Rule Power of Counties

1. Counties Generally - The Florida Constitution specifically provides that the state is to be divided into political subdivisions called counties²⁸ and has been construed by the courts to mean that all of the state must be divided into counties.²⁹ However, counties may be created, abolished, or changed by law.³⁰

The county is one of the political subdivisions of the state³¹ and is a mere governmental agency through which many of the functions and powers of the state are exercised.³² While the principle of local self-government does not constitute each county an independent sovereignty, managed by a board having legal rights,³³ the Florida Constitution recognizes the existence of counties as

local entities for local purposes as well as their existence as legal political subdivisions of the state.³⁴

2. Constitutional Home Rule Power of Charter Counties - Florida's Constitution grants charter counties "all powers of local self government not inconsistent with general law" and specifically provides:

Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.³⁵

3. Constitutional Power of Noncharter Counties - Counties not operating under county charters have only such power of self-government as provided by general or special law, and the board of county commissioners of a county that is not operating under a charter may enact, in a manner prescribed by general law, county ordinances that are not inconsistent with general or special law.³⁶

4. Statutory Home Rule Power of Counties - The Legislature has also granted charter and non-charter counties significant statutory home rule powers.³⁷ In general, the statutes mirror the Florida Constitution in providing counties with all the powers necessary to carry on county government. Section 125.01, F.S., lists a number of powers, but clearly indicates that the powers listed are not considered to be ALL the powers possessed by counties. Section 125.01(3), F.S., specifically states that "[t]he enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated, including, specifically, authority to employ personnel, expend funds, enter into contractual obligations, and purchase or lease and sell or exchange real or personal property." The statute further provides that "[t]he provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution."

D. County or Municipal Ordinance v. State or Federal Law

Counties and municipalities have broad powers to enact ordinances to implement their constitutional and statutory home rule powers.

Counties in Florida may enact ordinances in order to exercise the powers of self government as long as the power is exercised in a manner that is consistent with general law. The legislature may preempt that authority and may do so either expressly or by implication. Preemption essentially takes a topic or a field in which local government might otherwise establish appropriate local laws and reserves that topic for regulation exclusively by the legislature.

In s. 166.021(3), F.S., the Legislature recognizes that pursuant to the home rule powers provided municipalities by the Florida Constitution, the legislative body of each municipality has the power to enact legislation, i.e., ordinances, concerning any subject matter upon which the state Legislature may act, except any subject expressly preempted to state or county government by the constitution or by general law and any subject preempted to a county pursuant to a county charter adopted under the authority of the State Constitution. Therefore,

municipal ordinances are inferior to laws of the state and may not conflict with any controlling provision of a state statute. A municipality cannot forbid what the state legislature has expressly licensed, authorized, or required or authorize what the legislature has expressly forbidden.³⁸

Statutes enacted by the Florida legislature may preempt local legislative action, either explicitly or by implication.³⁹ Express preemption of a field by the legislature must be accomplished by clear language stating that intent. Implied preemption is actually a decision by the courts to create preemption in the absence of an explicit legislative directive. However, courts have been reluctant to preclude a local elected governing body from exercising its local powers. If the legislature can easily create express preemption by including clear language in a statute, the courts have found little justification to insert such words into a statute. In the absence of express preemption, normally a determination based upon any direct conflict between the statute and a local law is adequate to solve a power struggle between existing statutes and newly created ordinances.⁴⁰

Accordingly, courts imply preemption only when "the legislative scheme is so pervasive as to evidence intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." When courts create preemption by implication, the preempted field is usually a narrowly defined field, "limited to the specific area where the Legislature has expressed their will to be the sole regulator."⁴¹

In a contest of power between state government and local government, Legislative action may prevail even if the Legislature has not preempted a topic. When the Legislature takes action and enacts a statute, local government cannot adopt or enforce an ordinance that conflicts with the statute. In general, an ordinance conflicts with a statute when the two rules cannot coexist. Stated otherwise, legislative provisions are inconsistent if, in order to comply with one provision, a violation of the other is required. Generally under this definition, the fact that an ordinance imposes additional requirements on a person or business is not evidence of conflict.⁴²

- ¹ *Collier v. Gray*, 157 So. 40 (Fla. 1934); *State ex rel Church v. Yeats*, 77 So. 262 (Fla. 1917).
- ² *City of Jacksonville v. Continental Can Co.*, 151 So. 488 (1933).
- ³ *Johns v. May*, 402 So.2d 1166, 1169 (Fla. 1981).
- ⁴ *Advisory Opinion to the Attorney General -- Limited Marine Net Fishing*, 620 So.2d 997, 999-1000 (Fla. 1993)(McDonald, J., concurring).
- ⁵ *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994); *Shands Teaching Hospital & Clinics, Inc. v. Smith*, 480 So.2d 1366 (Fla. 1985).
- ⁶ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Gibson v. Florida Legislative Investigation Committee*, 108 So.2d 729 (Fla. 1958).
- ⁷ *Kansas v. Colorado*, 206 U.S. 46 (1907).
- ⁸ *State v. Miller*, 313 So.2d 656 (Fla. 1975); *Peters v. Meeks*, 163 So.2d 753 (Fla. 1964); *State v. Butler*, 69 So. 771(Fla. 1915).
- ⁹ *Ray v. Mortham*, 742 So.2d 1276 (Fla. 1999).
- ¹⁰ *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
- ¹¹ *HTS Industries, Inc. v. Broward County*, 852 So.2d 382 (Fla. 4th DCA 2003).
- ¹² *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996),
- ¹³ *Campbell v. Hussey*, 368 U.S. 297 (1961).
- ¹⁴ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).
- ¹⁵ *Id.*
- ¹⁶ Art. VIII, § 2(a), Fla. Const.
- ¹⁷ *City of Lake Worth v. State*, 111 So. 2d 433 (Fla. 1959).
- ¹⁸ *City of Clearwater v. Caldwell*, 75 So. 2d 765 (Fla. 1954); *Liberis v. Harper*, 89 Fla. 477 (1925).
- ¹⁹ *Brooks v. Watchtower Bible and Tract Soc. of Florida, Inc.*, 706 So. 2d 85 (Fla. 4th DCA 1998).
- ²⁰ *Daytona Beach Shores v. State ex rel. Mernbery*, 95 So. 2d 257 (Fla. 1957).
- ²¹ *State v. City of Sunrise*, 354 So. 2d 1206 (Fla. 1978).
- ²² Chapter 166, F.S.
- ²³ *State v. City of Jacksonville*, 50 So.2d 532, 535 (Fla.1951).
- ²⁴ *City of Ormond Beach v. County of Volusia*, 535 So. 2d 302 (Fla. 5th DCA 1988).
- ²⁵ *Islamorada, Village of Islands v. Higgs*, 882 So. 2d 1009 (Fla. 3rd DCA 2003).
- ²⁶ Ilene S. Lieberman and Harry Morrison, Jr., WARNING: MUNICIPAL HOME RULE IS IN DANGER OF BEING EXPRESSLY PREEMPTED BY . . . , Nova Law Review, 1994.
- ²⁷ *Id.*
- ²⁸ Art. VIII, § 1(a), Fla. Const.
- ²⁹ *Lipscomb v. Gialourakis*, 101 Fla. 1130, 133 So. 104 (1931).
- ³⁰ Art. VIII, § 1(a), Fla. Const.
- ³¹ *State ex rel. Watson v. Lee*, 157 Fla. 62, 24 So. 2d 798, (1946).
- ³² *State ex rel. Allen v. Bd. of Public Instruction of Broward County*, 214 So. 2d 7 (Fla. 4th DCA 1968).
- ³³ *Lewis v. Mathis*, 345 So. 2d 1066 (Fla. 1977); *Amos v. Mathews*, 99 Fla. 1, 99 Fla. 65, 99 Fla. 115, 126 So. 308 (1930).
- ³⁴ Art. VIII, § 1(a), Fla. Const.
- ³⁵ Art. VIII, § 1(g), Fla. Const.
- ³⁶ *Townley v. Marion County*, 343 So. 2d 1312 (Fla. 1st DCA 1977).
- ³⁷ See Chapter 125, F.S.
- ³⁸ *Mulligan v. City of Hollywood*, 871 So. 2d 249 (Fla. 4th DCA 2003).
- ³⁹ *GLA and Associates, Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003).
- ⁴⁰ *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011 (Fla. 2nd DCA 2005).
- ⁴¹ *Id.*
- ⁴² *Id.*